BRIEF IN SUPPORT OF PETITION.

The opinion of the Court of Appeals delivered upon the first appeal is reported in 117 Fed. (2) 446, that upon the second appeal in 127 Fed. (2) 837, and the one upon the third appeal in 138 Fed. (2) 708.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, United States Code, Title 28, Section 347(a).

By its last decision the Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions.

A sufficient statement of the facts in the case is contained in the accompanying petition.

The judgment of reversal sought to be reviewed was entered November 10, 1943, and appellee's (petitioner's) petition for a rehearing was denied without opinion January 3, 1944.

In reversing the judgment of the District Court on the third and last appeal, upon authority of *Metropolitan Life Ins. Co.* v. *Poole,* 3 So. (2) 386, (a copy of the opinion in which case is appended hereto) the Court of Appeals misconstrued the holding of the Supreme Court of Florida in that case, so that its judgment is now in conflict with settled law in Florida.

The error relied on is the holding that the Florida Supreme Court, by its decision in the *Poole* case, reversed a settled rule of law in its state.

Summary of Argument.

1. Precedent for granting a review.

2. Construction of the *Poole* Case by the Court of Appeals is erroneous.

3. The last decision of the Court of Appeals is in conflict with applicable local decisions.

Argument.

1. Precedent for Granting a Review.

Since its decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, this Court has granted a review on writ of certiorari of a decision of a circuit court of appeals upon petition showing that in a case controlled by *Erie Railroad Co.* v. *Tompkins* the court of appeals misconstrued a decision of a state supreme court in holding it to have changed previously settled local law. *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 83 L. Ed. 515, 59 S. Ct. 420.

2. Construction of the *Polle* Case by the Court of Appeals is Erroneous.

The Court of Appeals predicated its holding that the *Poole* case changed previously settled law in Florida upon a headnote to the Florida court's opinion, reading, "False answers made by insured in good faith to questions in application for life insurance policy do not vitiate policy", and also upon what it conceived to be the Florida court's "express approval of charges five and six", which, although not shown in the opinion in the *Poole* case, are exhibited in footnote 8 to the opinion by the Court of Appeals. (R. 218.) They were taken from the record of the *Poole* case which was filed in the Court of Appeals, and are, in substance, to the effect that the test to apply is whether the answers were made in good faith, and that representations touching consultations with or treatments by a physician stand on the same footing as representations of good health and do not furnish basis for avoiding liability on the policy unless they relate to some serious ailment material to the question of life expectancy. The Court of Appeals said that the Florida Supreme Court, in its ruling on these charges, "expressly

rejected the distinction made in the *Madden* case, and accepted by most of the courts in the country, between a statement of opinion as to whether the insured had suffered from particular ailments and of fact as to whether he had or had not consulted a physician. * * * It was taking its place with courts (citing four cases in footnote 12) which hold that, where a statute or policy, as here, provides that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, a representation, though false, does not avoid the policy unless it was made with conscious intent to deceive; that whether it was so made is normally for the jury. * * *"
(R. 218-219.)

The *Poole* case does not purport to decide the point which the Court of Appeals held was determined therein, the only issues considered or noticed by the Florida court being stated by that court as follows:

> "The defense interposed by the insurance company was in effect that the insured had made false answers to questions contained in the application for the policy and set forth wherein such answers were false. The plaintiff interposed replications denying that such answers were made by the applicant for insurance and alleging that the answers were written in the application by the agent of the insurance company without the knowledge of the applicant and that the agent assumed to write such answers, relying upon his own information and without having been advised concerning the facts by the applicant."

There is no such issue in these *Madden* cases. The Florida court held that in reviewing the *Poole* case on certiorari it could not go behind the judgment of the court below entered upon conflicting testimony; by which judgment the issues stated as above were adjudicated in favor of the plaintiff beneficiary and it so established that none of the

answers were in truth those of the applicant. Any distinction between answers of opinion as to whether the applicant had suffered from particular ailments and those of fact as to whether he had or had not consulted a physician, was therefore immaterial, and the court made no such distinction. The case is not a precedent for the elimination of a distinction between the two types of answers in cases where they were actually made by the applicant.

The Florida court did not approve the charges in the *Poole* case as correct abstract statements of law, appropriate in cases where, as in these *Madden* cases, the false answers were made by the applicant, its only reference to them being a statement that they "were appropriate to the issues made by the pleadings and the evidence." The charges do not appear in the opinion, which is sufficiently clear that no resort to the record in the case is necessary to determine what was decided. Furthermore, the Court of Appeals was not justified in holding the Florida court to have given "express approval of charges five and six" because their giving may have constituted reversible error in appellate proceedings without affecting the decision by the Florida court. The Florida Supreme Court was reviewing on writ of certiorari to a state circuit court a judgment of that court affirming a judgment of a civil court of record. The Florida constitution gives to circuit courts of that state final appellate jurisdiction in all cases arising in civil courts of record and does not authorize two successive appeals from judgments in such cases, one to a circuit court and another to the Supreme Court, wherefore, in proceedings in certiorari addressed to a circuit court as an appellate court in a case arising in a civil court of record, questions relating to the merits but in no wise affecting jurisdiction or the external proceedings in the case will not be reviewed, there being some substantial supporting evidence, the certiorari

authorized in such instances extending only to illegal proceedings that appear of record, as distinguished from erroneous actions of the trial or appellate courts. *Mutual Benefit Health & Accident Association* v. *Bunting*, 183 So. 321, and particularly with reference to charges, *Vanderpool* v. *Spruell*, 139 So. 892. The Florida Supreme Court has never quashed a judgment on certiorari because of erroneous charges to the jury.

The headnote to the opinion in the *Poole* case which is quoted in the last opinion of the Court of Appeals must be considered in relation to the body of the opinion it purports to digest. It can be made to fit the opinion only by interpolations demanded by the holding of the court, as follows, "False answers (written in an application by the insurer's agent without knowledge of the applicant) made (submitted to the insurer) by insured in good faith, to questions in application for life insurance policy, do not vitiate policy."

The only reference to good faith in the opinion in the *Poole* case is found in a quoted excerpt from the opinion in an earlier Florida case, *New York Life Ins. Co.* v. *Kincaid*, 165 So. 553, which is not in point with these *Madden* cases. An analysis of that case was made by the Florida court in *Winer* v. *New York Life Ins. Co.*, 197 So. 487. Under the issues recited in the opinion in the *Poole* case, the applicant Poole's good faith was not under consideration as appurtenant to false answers given by him, as the applicant Madden's good faith must be considered, and could only have been material in determining whether Poole consciously participated in the fraud practiced upon the insurance company by its agent so as to preclude recovery by the beneficiary. Poole's fraudulent concealment of knowledge that he suffered from or had consulted with or been treated by a physician for some serious ailment material to the question

of life expectancy would have precluded recovery on the policy regardless of his being questioned, the applicant's good faith in such cases being universally held a prerequisite to recovery.

No authorities establishing the rule attributed to the Florida court in the *Poole* case are cited in the opinion in that case, but on the contrary that court states in the opinion that the case is ruled by *Mutual Life Ins. Co.* v. *Hurni Packing Co.* (8 Cir.) 260 Fed. 641, text 646, *New York Life Ins. Co.* v. *McCarthy* (5 Cir.) 22 Fed. (2) 241, and *Moulor* v. *American Life Ins. Co.*, 111 U. S. 335, 4 S. Ct. 446, 28 L. Ed. 447, in all of which the very distinction which the Court of Appeals held was expressly rejected by the Florida court was drawn and made the basis of decision. The result is that the Court of Appeals has held, paradoxically, that the rule announced by it in *New York Life Ins. Co.* v. *McCarthy* (cited in footnote 4 to its last opinion), was repudiated by the Supreme Court of Florida in the *Poole* case, although the Florida court, in its opinion in that case, expressly states, "This case is ruled by * * * *New York Life Ins. Co.* v. *McCarthy* (5 Cir. § 22 F. (2d) 241. * * *"

The *Kincaid* case has been heretofore referred to. The remaining cases cited in the opinion, three decided by the United States Supreme Court and one by the Florida Supreme Court, are all in point with the issues stated; in one of them there was testimony that the insurer's agent assumed to write the alleged false answers into the application, relying upon his own information and without having been advised concerning the facts by the applicant and without the applicant's knowledge or assent, while in the other three it was shown that the applicant answered the questions truthfully but different and false answers were substituted in the application by the agent.

3. *The Last Decision of the Court of Appeals Is in Conflict with Applicable Local Decisions.*

The Court of Appeals said in both its first and last opinions that its first decision was in accord with the then "settled law" in Florida. In its last opinion the court said that most of the courts in the country accepted the distinction between a statement of opinion as to whether the insured had suffered from particular ailments and of fact as to whether he had or had not consulted a physician. In construing Florida decisions the Court of Appeals should be constrained to interpretations that will harmonize them with previously settled law. We have seen no cases holding that a misrepresentation by way of a false answer of fact will not bar recovery on a policy unless found by a jury to have been "made with conscious intent to deceive," where "the answer was, and was known to be, untrue" and "was deliberately and knowingly made," and where the information that would have been revealed by a truthful answer was, under conclusive evidence, "material as matter of law" to the insurer "as a basis for further inquiries in determining his (applicant's) insurability." (The phrase first quoted in the above sentence is from the last opinion, the others from the first opinion.) None of the four cases cited in footnote 12 to the Court of Appeals' last opinion sustain such a proposition, but on the contrary the first three support the court's first decision and in the fourth it was held merely that the illness for which the consultations were had was so inconsequential that the case came within the rule excusing failure to disclose such consultations (R. 219). The statement to which they are cited, "that, where a statute or policy, as here, provides that all statements by the insured shall, in the absence of fraud, be deemed representations and not warranties, a representation, though false, does not avoid the policy unless it was made with conscious

intent to deceive," implies that the Florida court based its decision in the *Poole* case upon that policy provision. The Florida court does not say in its opinion whether the statements there under consideration were representations or warranties, and in view of the establishment that they were not in truth made by the applicant at all, their classification was immaterial.

If the construction put on the *Poole* case by the Court of Appeals stands, the Florida Supreme Court is committed to a per curiam overruling of its former decisions, without so much as referring to them, and the establishment of a doctrine having no precedent and grossly unfair to life insurance companies doing business in its state.

The frequency with which the question involved arises in the courts is demonstrated by its having been passed upon by the Circuit Court of Appeals for the Fifth Circuit in the following five cases appealed from the District Court for the Southern District of Florida since 1930 and prior to institution of the *Madden* actions.

Tutewiler v. Gardian Life Ins. Co., 42 Fed. (2) 208;

Equitable Life Assur. Soc. v. Schwartz, 42 Fed. (2) 646;

Aetna Life Ins. Co. v. Bolding, 57 Fed. (2) 626;

Pacific Mutual Life Ins. Co. v. Cunningham, 65 Fed. (2) 909, reversing (District Court) Pacific Mutual Life Ins. Co. v. Cunningham 54 Fed. (2) 927. Certiorari denied Cunningham v. Pacific Mutual Life Ins. Co., 54 S. Ct. 121, 290 U. S. 685, 78 L. Ed. 590;

Phillips-Morefield v. Southern States Life Ins. Co., 66 Fed. (2) 29.

The question was also decided by the Florida Supreme Court on two occasions between the first trial of these *Madden* cases and rendition of the first decision therein by

the appellate court; in Thompson v. New York Life Ins. Co., 197 So. 111, and Winer v. New York Life Ins. Co., 197 So. 487. Both of these cases are cited by the Court of Appeals in its first opinion and there followed, and in its last opinion as illustrating the former rule in Florida. Neither of them is cited in the *Poole* case opinion, written one year after they were decided; nor is the first decision of the Court of Appeals in these *Madden* cases cited in that opinion, although it was rendered five months before the opinion was written.

The question has also been before the Circuit Court of Appeals for the Fifth Circuit in one case decided subsequent to its first decision in the *Madden* cases and prior to its last. That case, Sun Life Assurance Co. v. Maloney, 132 Fed. (2) 388, also arose in the District Court for the Southern District of Florida, and the appellate court rested its decision solely upon its first decision in the cases at bar, thus:

> "We need not, however, consider or determine whether appellant or appellee has the right of it in respect of the first defense, for we think it settled by Metropolitan Life Insurance Co. v. Madden, 117 Fed. (2) 446, that the verdict should have been directed for defendant on its second defense that assured falsely answered questions seeking information which was material to the risk."

The decision in the *Poole* case antedated this decision in the *Maloney* case by some eighteen months and, by a coincidence pointed out in petitioner's brief on the last appeal and in its petition for a rehearing, one of the appellee Maloney's attorneys also represented the respondent Poole in the Florida Supreme Court; in spite of which it was not argued in the *Maloney* case that the *Poole* case was in point and had the effect of changing any rule of law in Florida. The *Poole* case was, however, called to

the attention of the Court of Appeals by counsel for the appellant insurance company in their brief in the *Maloney* case and by them successfully distinguished in the same manner as petitioner's counsel unsuccessfully attempted to distinguish it on the last appeal in the *Madden* cases.

The *Poole* case had also been decided when the second appeal was taken in the cases at bar, respondents' counsel vigorously contending on that appeal that the decision on the first appeal should not be applied because it was contrary to the *Poole* case. Nevertheless, the Court of Appeals said in its second opinion that the first reversal for error found in the first trial "meant a new trial with an avoidance of the same errors." The respondents' contention had been met by petitioner with the same argument, that the *Poole* case does not purport to change Florida law, which was advanced by the appellant insurance company in the *Maloney* case and again by petitioner on the last appeal.

The Court of Appeals' first decision is followed, and its opinion thereon quoted from at length, by Circuit Judge Parker in his opinion for the Circuit Court of Appeals for the Fourth Circuit in McSweeney v. Prudential Insurance Co., 128 Fed. (2) 660, wherein it is held that the question as to whether a case should be submitted to the jury or verdict directed is a matter of federal practice as to which local decisions are not controlling, and further, with respect to fraud, that clearly "fraud of the sort required to avoid the policy is shown to exist where there is a false representation as to a material matter, which is false to the knowledge of the applicant at the time it is made and which is made for the purpose of being acted on by the company. Where these facts appear, it is idle to inquire further whether there was intent to defraud; for the intent to defraud in such case is the intent to obtain the policy by the false representations."

The opinion of the Court of Appeals of New York in Geer v. Union Mutual Life Ins. Co. (1937), reported in 7 N. E. (2) 125, is the most exhaustive one we have found on the question here under consideration. The case is cited by the Court of Appeals in footnotes to both its first and last opinions.

The writ prayed for in the petition should be granted.

Respectfully submitted,

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